Supreme Court, U.S.
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No. 95-307

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1995

John C. Dorman and
Wilma L. Dorman,
Petitioners,

v.

Pauline Jones and
Ann Ell Westbrook, ET AL,
JOHN DOE(S) 1-50
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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BEST AVAILABLE COPY

PUBLISHER'S NOTE:

Page(s) 1 missing in original.

QUESTIONS PRESENTED

Contrary to the respondents statement that the only question which should come before this court is the mootness question; by law, due to the fact that the lessors' "Surrender Order" was obtained in violation of debtors' automatic stay, is void *ab inito* pursuant to U.S. C. 362.

And once the lessors' judgment became void *ab initio* by virtue of the violation of the automatic stay, it was as if the entire proceeding had never occurred. Consequently, the Supreme Court should move to vacate the February 24, 1993, judgment and the subsequent May 26, 1993 void *ab inito* orders which were the direct result of the subject, void from the beginning, "Surrender Order" order.

Pursuant to 11 U.S.C. 362 (a) (3) the filing of a Chapter 11 petition invokes an automatic stay against all creditors from performing any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. The purpose of this provision is to prevent dismemberment of the estate.

The lessors, Pauline Jones and Ann Ell Westbrook did not file a Motion or move the bankruptcy judge to grant them relief from the automatic stay, and under Bankruptcy Rule 2395, unless bankruptcy court grants relief from automatic stay,

all judicial actions and proceedings against debtor initiated while stay is in effect are void *ab initio* = void from the beginning. As such, the judgment was void from the beginning and carries no legal force or effect now, and cannot be cured.

The law is clear that judgments entered during pendency of a bankruptcy proceeding without relief from the stay are void ab initio. As set forth in the language of Section 362 of the bankruptcy code, the automatic stay is "applicable to all entities", including state and federal courts. The code is applicable to the lessors as an entity and if the state and federal courts are subject to the code then the lessors should be held accountable too.

And a simple review of the dates involved in the instant matter supports a finding that the automatic stay was violated. As such the order was void from the beginning and carries no legal force or effect now. <u>And an appeal from such orders would not be moot.</u>

And the Supreme Court has the right to overturn the subject "Surrender Order" and the lessors cannot avoid the consequences of violating the automatic stay. AND THE COURT HAS THE POWER TO ENTERTAIN AN INDEPENDENT ACTION OR TO SET ASIDE A JUDGMENT FOR FRAUD UPON THE COURT, <u>OR ORDERS WHICH ARE VOID *AB INITO*.</u>

And the issues are not moot because the lessors' surrender order is void from

the beginning due to the lessors violating the debtors automatic stay.

Petitioners, John C. Dorman and Wilma L. Dorman request that a writ of certiorari be granted because the lower bankruptcy court has departed from the accepted and usual course of judicial proceedings as the petitioners have proved from their pleadings and from the attached orders and transcripts of the lower bankruptcy court and judge Paul B. Lindsey said that he was not going to change his ruling and that someone would have to tell him that he was wrong. And he won't listen to the Dormans and neither has the District court or the Tenth Circuit court of appeals. Therefore the district court and the appellant court have sanctioned such a departure and have not afforded any relief to petitioners grievances. And such a departure calls for an exercise of this court's power of review and supervision.

Petitioners contend that all the question presented by the Dormans in their petition for Certiorari are still valid questions and should be answered, and are relevant for justice to be done and for the Supreme Court to review the lower bankruptcy courts improper void *ab inito* proceedings.

The Dormans were subjected to cruel and unusual punishment and their rights were violated and they have not receive due process of law.

As the petitioners asked in their petition although worded differently, "Should Clearly Erroneous orders and proceedings in the lower bankruptcy court continue in/with full force and effect when in fact they are void *ab inito*, thereby deemed to have no force or effect?

In the submitted transcript of February 23, 1993, Judge Lindsey and the trustee Jack Cornelius determined that if the subject lease was surrendered to the landlord's that the farm would no longer cash flow and would have to be remanded to a liquidation plan. 11 USC 1112 (c) prohibits the court from converting a case concerning a farmer to a liquidation case unless the debtor consents. Was the Dorman family farmers' rights violated when the court sanctioned and confirmed a liquidation plan over the debtors' objections and without their consent? And when the Federal Income tax return was filed as a Chapter 7 liquidation?

When the controlling lender's attorney in the submitted transcript of February 26, 1993, states that the trustee has proposed a liquidation plan. As the petitioners' questioned in their petition for Writ of Certiorari, "Wouldn't this "taking" constitute cruel and unusual punishment under the eighth amendment? And violate debtors's Fifth amendment rights?

PARTIES TO PROCEEDING BELOW

The appeal was filed in the bankruptcy court March 5, 1993, before the subject leases were relet to Jake Slatten, Jeff Slatten and Jack Slatten and Earl Semmel and all other parties were served both in the District Court and the Tenth Circuit Court of Appeals. None of the parties but Jones and Westbrook responded; the others are all in default, their time to respond or object has expired. Since they did not respond or object in the Tenth Circuit Court of Appeals, why should they be served on the Writ of Certiorari to the Supreme Court?

Plus Jones and Westbrook inserted ET AL as respondents. ET AL = all others, in the Black's Law Dictionary. These others are the third parties that Jones and Westbrook relet the Dorman Partnership leased lands to: Jake, Jeff and Jake Slatten and Earl Semmel, and Gene Sharp, counsel for the lessors. Sharp has been in extreme conflict of interest and immoral and unethical law practice.

1. He is related to both the respondents and the petitioners.
2. He has counseled both parties as an advisor and attorney.
3. He has been a lessor of the Dormans' son, John Mark Dorman and
4. John C. Dorman's brother, Richard H. Dorman.
5. And, Gene Sharp's mother was a lessor to John C. Dorman.

6. Plus he desired to be Jones and Westbrook's farm/business manager; and he has been ram roding, managing, controlling and determined who would receive the relet land leases.
7. Charles Underwood, petitioners' former attorney testified in open court that, "... at that time we were negotiating with, I believe, it's a Mr. Sharp, out of Liberal, Kansas on these leases. And I believe we didn't feel that there was a problem at that time. And it wasn't until after the fact, I think it was Mr. Steve Elliott got involved, and they decided they were going to reject the leases. Q. You mean, the owners of the land. A. Mr. Sharp represented to the owners of the land, Your Honor. He's an attorney out of Liberal.Gene Sharp had agreed to the reaffirmation of the leases

The Dormans have been mailing the attorney general of the State of Oklahoma and the Attorney General of the United States copies of their documents as they represent the justice system and they <u>should be interested in seeing that justice is done.</u> Also, they were on the mailing matrix of the bankruptcy court. And the Attorney General, John Green filed his appearance in the court and the judges were served because they were named in the briefs along with their "clearly erroneous" orders and ruling which violated the Debtors rights under the Constitution and due process.

Judge Lindsey knew that he had been spending all his time in Florida and knew that the court proceedings had not been conducted properly; he dumped the case because it could not be cured, after he admitted to the Dormans that he might have made a mistake - he recused himself. And Judge Covey enjoined the Dormans and their sons under a permanent injunction, which violated due process.

JURISDICTION

158 (d) 1334 (b)

28 U.S.C. 1651 (a) - Unconstitutional discrimination against Chapter 11 Reorganization petitioners.

28 U.S.C. 2403 (a)
Wilma Dorman, her two sons, and two grandsons are American Indians of the Cherokee tribe and utmost good faith has not always been observed toward them. Their land and property has been taken from them without their consent; and their property, rights and liberty has been invaded and disturbed and there was not just or lawful war authorized by Congress. And laws founded in justice and humanity should be made for preventing wrongs being done to them.

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In re Blumer, 15 BCD 244, 66 BR 109, 16CBC2d 409 (CA9 BAP 1986 (364 (c))

CONSTITUTIONAL PROVISIONS

Same as presented in Petition of Writ of Certiorari.

STATUTES

11 U.S.C. 362
365 4
60 (b)
7052

OVERTURNING THE COURT'S FINDINGS
752.2 CLEARLY ERRONEOUS RULE
CIVIL RULE 52 (a)
RULE 810

REVERSAL IS NOT LIMITED TO RESULTS THAT ARE "CLEARLY ERRONEOUS" AND THAT IS ENOUGH THAT APPELLATE COURT SHOULD BE CONVINCED THAT THE RESULT DOES NOT JIBE WITH THE APPLICABLE RULE OF LAW. (See 9 Am Jur 2d BK 103, 107, 728, 1683, 1684.

Rule 924.2 Relief from judgment or orders on grounds such as mistake, inadvertence, excusable neglect, newly discovered evidence or fraud.

Rule 505.3 Nepotism, influence, and interest disqualification - Appearance of influence. Any judge should disqualify himself if in his acting there would be appearances or actions to justify the impression that any person can improperly influence him or unduly enjoy his favors, or that is affected by the rank, position, or influence of any party or other persons.

The advisory committee note cites. B. J. M. Realty Corp. v. Ruggieri (CA2 NY) 338 F2d 653, and B. J. M. Realty Corp v. Rugieri (CA 2 NY) 326 F2d 281, holding that a lessor waived his option to terminate a lease by accepting rental

payments for four months following the filing of a Chapter XI petition by the lessee, so that the lease could thereafter be affirmed.

11.54.2 (b) Also recognizes a difference between Chapter XI and bankruptcy cases. In bankruptcy the property will be sold; in Chapter XI case a sale, other than in the ordinary course of business, would be exceptional.

Civil Rule 65 (c) states, in part, that no restraining order or preliminary injunction shall issue except upon the giving of security by the application, in such sum as the court deems proper, for the payment of such cost and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Rule 801 states that the mere allowance of fees is appealable if the power of the court to assess costs, in the first instance is challenged. Re Eastern Erectors, Inc. (DC Pa) 396 F Supp 797.

In re Saybrook Mfg Co., 963 F2d 1490 (CA11 1992 (cross-collateralization is not authorized under 364. It is "directly contrary to the fundamental priority scheme of the Bankruptcy Code." (364(c))

Therefore numerous judgments are void including the order confirming the trustee's liquidation plan and the subsequent sale of lands and property

which the First National Bank, Hooker, Oklahoma claimed cross-collateralization. The bankruptcy judge did not have authority to confirm orders which were "directly contrary to the fundamental priority scheme of the Bankruptcy Code." (364(c).

365 4(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties,

UNDER BANKRUPTCY 2395
Unless bankruptcy court grants relief from automatic stay, all judicial actions and proceedings against debtor initiated while stay is in effect are void ab initio. Bankr. Code 11 U.S.C.A. 362.

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BRIEF IN REPLY
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COMES NOW the petitioners, John C. Dorman and Wilma L. Dorman, and submit their brief in reply to the opposition to the Dormans' Petition for a Writ of *Certiorari.*

MATERIAL FACTS

The vacating and "surrender Order" obtained by the lessors, Pauline Jones and Ann Ell Westbrook after the petition of relief was filed under Chapter 11 for Reorganization was void ab initio as obtained in violation of stay. As this matter goes to issues involving property of the estate and the automatic stay, it is a core proceeding as defined by

Congress in 28 U.S.C. Sec 157 *et seq.* The opinion constitutes findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

In all the respondents briefs and their statutes, they have not listed Bankruptcy Code 362 because they did not file a motion for the bankruptcy court to lift the automatic stay; therefore the lessors violated the debtors automatic stay. And due to the "Surrender Order" being obtained during the pendency of the debtors' initial bankruptcy proceeding, it was obtained in violation of the automatic stay and is therefore *void ab initio.*

Pursuant to 11 U.S.C. 362, the filing of a chapter 11 bankruptcy petition invokes an automatic stay against all creditors from performing any acts to create, perfect, or enforce any lien against property of the estate and property of the debtor. The purpose of the automatic stay is to give the debtor a breathing spell from his creditors and stop among other things, all collection efforts, harassment and foreclosure actions. 11 U.S.C. 362 thus enables the debtor to attempt a repayment or reorganization plan or simply to be relieved of the pressures that drove the debtor into bankruptcy.

362 (a) (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the

estate. The purpose of this provision is to prevent dismemberment of the estate.

The Third Circuit has recognized that the effect of the automatic stay provision of the bankruptcy code is to "suspend any nonbankruptcy court's authority to continue judicial proceedings then pending against the debtor". As set forth in the language of section 362 of the bankruptcy code, the automatic stay is "applicable to all entities', including state and federal courts. *Id.* Appropriately, unless the bankruptcy court grants relief from the stay, all judicial actions and proceedings against the debtor initiated while the stay is in effect are void *ab initio.* *Id. See also, Kalb r. feurstein 308 U.S. 433, 438-39, 60 S.Ct. 343, 346, 84 LEd. 370 (1940).*

And a simple review of the dates involved in the instant matter supports a finding that the automatic stay was violated. As such the order was void from the beginning and carries no legal force or effect now.

"Ab initio" is from the Latin meaning "[f]rom the beginning." Black's Law Dictionary. 5th Ed. (1979). Accordingly, once the "Surrender Order" judgment became void *ab initio* by virtue of the violation of the automatic stay, it was as if the entire proceeding had never occurred. Consequently, the Supreme Court should investigate the lower courts, most especially the

bankruptcy court because the court allowed the adverse controlling lender to violate debtors automatic stay also. The Supreme Court should vacate and reverse subsequent orders; most especially the order confirming the trustee's liquidation plan. The court would be found lax to find differently. To hold otherwise would result in the unwanted effect of rewarding creditors and lessors for violation of the automatic stay. Should the court allow a creditor or lessor who knowingly obtains a judgment in violation of the automatic stay, to ratify that judgment, what would stop all creditors and lessors from proceeding to judgement in violation of the stay? This would certainly defeat the purpose of the automatic stay, which is to afford protection to debtors and enable them to focus attention on their bankruptcy proceeding. Thus the court cannot allow actions of creditors to erode the purpose and intent behind the provisions of the automatic stay. (Debtors' briefs in the Tenth Circuit Court asserted the violation of their automatic stay by the lessors and the adverse lender; it was ignored.)

362 (h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

If the violation of the automatic stay was not enough; the "Surrender

Order" was also void *ab initio* due to the bankruptcy court's own local rule 12(h)(4), if an order is not submitted and filed within twenty days of the expiration of the response period, the motion will be stricken.

Assuming the response time on the Motion had expired, as represented in the Order and the Order was submitted well outside the time period specified in Local Bankruptcy Rule 12(h)(4). In fact, the Order was submitted only after counsel for the Debtors was told on or about February 4, 1993 by the lessors' attorney Stephen Elliott that no order thereon had ever been entered. The Order, which counsel for the Movants assert was never served had only came to their attention through an offhand comment by counsel for the Trustee, was therefore submitted and entered on a motion that was either deemed to have been stricken or that should have been stricken. If the Order should have been stricken; it should have been stricken on December 8, 1992, when the Motion for Extension was assumed to have been untimely filed by one day. Else the Motion should have been stricken when the order had not been submitted and filed within the twenty days of expiration of the response period.

Court clerk and court neglected to deny the filing of the untimely Motion to Extend, and the judge omitted through inadvertence or mistake to Strike the Motion when an order was not presented

according to the court's own local rules. Twenty days would have been stricken on December 28, 1992. (Assuming the judge was correct in vacating his Extension Order and in further ordering the "Surrender Order"; then the order should have been confirmed nunc pro tunc, retroactively to either December 8, 1992 or December 28, 1992; rather than February 23, 1993.)

If the bankruptcy court had ordered the motion stricken at the proper time and performed its legal obligation in a timely manner, as it should have and even if he had deemed the leases rejected by default or by law and ordered the surrender of the leased land; the "Surrender Order" would have instructed the debtors in possession, not a trustee, to surrender the land.

There would not have been the court approved, unauthorized "agreed to" order appointing Jack Cornelius as trustee and he would not have filed the liquidation plan and liquidated the farm and ranch, the trust, 1300 acres of minerals, Lonetree, Inc., sons' property and personal exempt property of the Dormans and all of the other assets. No liquidation plan would have been filed.

During this time period the petitioners were debtors in possession and their Disclosure Statement with attached Reorganization Plan was filed on December 21, 1992.

Bankruptcy judge Paul B. Lindsey also signed two subsequent void ab initio orders on May 26, 1993. The first one was the trustee's Compromise Agreement which stipulated that the judge had to approve the compromise in its entirety before the lessors would withdraw their objection to the trustee's Liquidation Plan. The judge would not confirm the liquidation plan without the lessors withdrawing their objection; he agreed to approve the compromise agreement if the lessors would withdraw their objection to the liquidation plan; the lessors' attorney, Stephen Elliott verbally agreed to withdraw the lessors objection; without notice or a hearing and judge Paul B. Lindsey confirmed the trustee's Liquidation Plan over the objections of the debtors, John C. Dorman and Wilma L. Dorman. Thus the second void *ab inito* order was the Confirmation Order for the trustee's Liquidation Plan.

And pursuant to 365 4 (c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment or rights or delegation of duties,...yet, the trustee violated this ruling by assuming the leases until April 2, 1993 and by his agreeing to assign leases by helping lessors to relet the leases. His "Clearly Erroneous" "Void *ab inito*" court approved "Compromise Settlement Agreement" with the lessors states within the compromise agreement that the leases will be deemed released

to lessors on April 2, 1993, when the court approved "Surrender Order" ordered the trustee to "immediately" surrender the land to the lessors; dated and filed February 24, 1993. The void *ab inito* Compromise or Settlement agreement order also violated 365 4 (c) by stating that the trustee would also help the lessors in releting the land to others.

In Trustee's Compromise Agreement with the lessors, the trustee states that the land would be surrendered April 2, 1993, almost two months after the court has ordered the "immediate" surrender of the land.

The Dormans filed an adversary suit No. 93-01141 filed April, 1993. The debtors claimed the wheat crop, ASCS payments and malpractice suit against former attorneys. Hearing was set for declaratory judgment on June 16, 1993. The settlement agreement had a specific clause in which lessors demanded that the crops, ASCS payments etc did not belong to the Dormans; that if the court did not approve the settlement agreement in full that the lessors would object to the trustee's liquidation plan. The lessors filed an objection to the plan and Stephen Elliott verbally withdrew the objection the day of the trustee's confirmation hearing on his liquidation plan. This was improper, misconduct, illegal and fraud upon the court, and the judge signed a prejudgment order. The Dormans did not appeal the settlement agreement because they did not know if it

in time; but did appeal the adversary order which Judge Covey rubber stamped the later part of June, 1993, after Judge Lindsey recused himself. Judge Covey did not even know it was an adversary suit or that he had signed it without a proper hearing. Appendix I

There have been far too many mistakes, misconduct and improper court proceedings and clearly erroneous orders and unauthorized "agreed to" court approved orders in the bankruptcy court to simply dismiss the petitioners' certiorari when Rule 60 (b) states: Relief by motion from judgment or order are entirely appropriate in bankruptcy cases. And the motion was filed in the Tenth Circuit court of appeals with brief and brief in support; dismissed and appealed to the Supreme court in petitioners' Writ of Certiorari.

The Motion was entitled, "MOTION FOR REDRESS OF GRIEVANCE WITH REQUEST FOR WRIT OF ERROR AND WRIT OF SUPERVISORY CONTROL AND BRIEF IN SUPPORT OF APPEAL AND MOTION FOR REDRESS OF GRIEVANCES".

The docket sheet, documents filed in the courts, orders of record and transcripts which the Dormans have submitted: dated February 3, 1993, February 24, 1993, and February 26, 1993 substantiate the Dormans claims.

Everyone acted to cover up his misconduct and helped to cover up the court's inaction and misconduct.

No one sought an extension of time beyond the twenty days because the plan would have been confirmed on February 26, 1993.

The lessors state that the only reason they had not opposed the untimely Motion to Extend was because they had never been served. Both Jones and their attorney of record Lynn Pringle of Pringle and Pringle had been served, although lessors are not considered creditors and are not required to be served unless lease is in default - they were not in default - current ten year leases.

Stephen Elliott, lessors counsel of record in the Supreme Court never filed his appearance in the bankruptcy court neither did he pay his filing fee. John Hughey, attorney for the trustee did not pay his filing fee or file his appearance in the bankruptcy case. What are they doing stating that they are counsel of record when they haven't even filed their appearance in the bankruptcy court or paid their filing fees? What are they doing practicing law and filing documents when they haven't even filed?

Just as the bankruptcy court should have denied the filing of an untimely motion, the lessors attorneys should have known it was untimely and should have known an order had not been entered. All attorneys are charged with knowledge of the law as are the judges. The only ones

with an excusable excuse are the Dormans because they trusted the court, the court officers and they later warned the judge and all the attorneys by caveat, constructive notice and judicial notice that they would be held accountable if they did not protect the rights of the Dormans - if they allowed the Dormans' Constitutional rights to be violated.

Judge Lindsey granted an ex parte application and order which also shortened the time to respond to 5 days and granted the hearing by ex parte order.

<u>See respondents' Supreme Court Appendix on Page 11, statements as follows:</u>

1. A Confirmation hearing on debtors plan of Reorganization is set for March 26, 1993 at 9:00 a.m.

WRONG! The date should read February 26, 1993. And the last paragraph, once again has represented the wrong date; March 26, 1993, rather than February 26, 1993. Also in the motion, Judge Lindsey marked through the 26th and shortened it two more days, changing the requested date on the motion to the 23rd of February - two days before the date set for the hearing for debtors plan of confirmation.

Lessors counsel states that debtors counsel did not complain of shortened time to respond and hearing - he did

complain in the transcript. He also complained about Judge Lindsey's absences due to his numerous absences running circuit to Florida.

Judge Lindsey complained about the Discovery Statement not being submitted earlier. It had been submitted twice before, each time the adverse controlling lender, the First National Bank, Hooker, Ok would object. The bank objected for everyone, including the unsecured creditors. The bank violated the automatic stay any number of times.

1. The Dormans Disclosure statement is filed December 21, 1992; on the very day that the bank had reduced the debtors' exclusive time to. The time had been reduced from 120/80 days and from 180/140;

2. On January 14, 15 days after the Disclosure Statement has been filed and no objections have been filed, debtors' attorneys file an Application to shorten time for hearing on Debtors' Disclosure Statement and for filing objections to same. (The time for objecting was almost up.)

3. On January 15, 1993, First Amended Disclosure Statement is filed.

4. On January 15, 1993, Notice of Hearing scheduled for 9:30 2/3/93. (The judge should have scheduled a hearing 25 days after it was first filed; Twenty-five days from December 21 would be

January 5, 1993. A good month before it was scheduled. How many times is the debtor required, by law, to have unauthorized agreed agreements and orders between debtors' attorney and the controlling lender forced upon them, before the filed Discovery Statement is approved? (Harassment of adverse controlling lender.)

5. The Discovery Statement was approved at the hearing on 2-3-93, and the three objections were agreed to - whatever they were, without debtor in possessions authorized agreement. (Of course of the objectors was The First National Bank of Hooker.

6. Jack Cornelius is approved as trustee through an "agreed to Order" between Kirk and Bickford.

Debtors have just recently learned that these two made agreements starting with the cash collateral loan in November, 1992, when debtors' exclusive time was reduced by agreed to order which they did not authorize, neither did they agree to debtors' attorney placing the borrowed cash in their own trust account. These two agreed between themselves about: a. the use of cash collateral which bank was overcollateralized, and FNB asserted its first claim of cross-collateralization. b. Debtors' exclusive time reduced from 120/80; 180/140 and the appoint of Jack Cornelius as trustee. (All of this was done by the bank to control the debtors and the estate and to

obtain debtors' exclusive rights, thereby violating the stay and making all these court approved "agreed to" orders void ab *inito, and nunc pro tunc.)*

6. The scheduled court hearing for Discovery Statement and Debtors Reorganization Plan's filed was set for February 26, 1993.

7. February 23, 1993, Judge Lindsey's Extension order vacated and trustee ordered to immediately surrender the land.

8. February 24, 1993, Order filed striking hearing for Confirmation Hearing set for February 26, 1993.

9. John Hughey, trustee's attorney and Mike Bickford are granted an ex parte order for emergency loan, they assure judge Lindsey that they have notified everyone by fax. Debtors were not noticed, plus meeting was held on date when debtors' plan was to have been confirmed. Bickford states that FNB is not concerned about the lien because the trustee has proposed a plan of liquidation. (This only two days after the "Surrender Order".

The agreed to order which Paul B. Lindsey approved on February 26, 1993, is void due to the fact that all parties were not notified even though attorney for both the trustee and the bank assure the judge that everyone had been notified. There had not been time; the

leases had only been ordered surrendered on the 23rd and the judge granted the trustee the loan on February 26, 1993.

Procedural due process requires individualized notice be given to secured and unsecured creditors prior to granting order approving loan; order obtained without notice is void. In re Blumer, 15 BCD 244, 66 BR 109, 16 CBC2d 409 (CA9 BAP 1986 (364 (c))

1. The Judge rendered a prejudgment order.

2. Trustee overreached his authority in claiming right to property of debtors which had been deemed rejected by bankruptcy court - if rejected from estate - trustee cannot reclaim debtors' rights.

3. Lessors had not filed claim for damages or default of leases.

4. Lessors owed Dorman Partnership for expenses incurred in 1991, due in 1992 for the wheat crops which were harvested in 1992. In excess of $3,000.00. And the Dorman Partnership did lease the Pauline Jone's farm and grass land; she rented 160 from her son and 80 acres from her daughter Ann Ell Westbrook. Jones in turn rented these to The John and Wilma Dorman Partnership; Wilma had to check with tax consultant about tax liability etc and sign specific ASCS government documents before she could receive checks in her name or indemnity checks from the

Federal Crop Insurance for her disaster losses and she received checks in her name through marketing her share of the wheat and milo crops. Even Pauline Jones knew that only John, she and Wilma signed ASCS papers and that they each received a share. Wilma did not receive any funds or crops from the other land that John had leased only in his name. And the partnership had not filed bankruptcy, the partnership had an agreement with John C. Dorman dba Dorman Farms.

The Dormans did raise the lack of notice issue in the lower court and also raised the issue of the lessors violation of the debtors automatic stay, which voids the Surrender Order from the beginning. Unless bankruptcy court grants relief from automatic stay, all judicial actions and proceedings against debtor initiated while stay is in effect are void *ab initio.* Bankr Code 11 U.S.C.A. 362. In re Joseph P. Cappadonna v Howard Sav. Bank, N/K/A First Fidelity Bank, N.A Cite as 154 B.R.639 Bkrtcy D. N. J. 1993)

The Dormans did answer the motion to dismiss because the District Court had notified the lessors that the Motion to Dismiss could not be filed because the Dormans had appealed the "Surrender Order" to the Tenth Circuit Court.

Pursuant to the Bankruptcy code 364 (c) Cross-collateralization is directly contrary to the fundamental priority scheme of the Bankruptcy Code, yet the

controlling adverse lender, The First National Bank, Hooker, Oklahoma, claimed cross-collateralization in all their pleading:

1. The bank was not concerned with adequate protection; the bank sought to control both the debtors in possession and the property of the estate, thus violating the automatic stay.

2. The court approved "agreed to order" dated November 4, 1992 between D. Benham Kirk, Jr. and Michael Bickford, authorizing and restricting the use of cash collateral in their possession and control and the adverse lender's attached budget and further agreement of the joint motion filed on November 5, 1992.

3. On November 5, 1992, the docket states that a joint motion by debtor Wilma L. Dorman, debtor John C. Dorman and Creditor The First National Bank of Hooker to reduce debtor's exclusive time to file plan, and to gain acceptance of plan of reorganization. Certificate of mailing by M. Bickford. DEBTORS DID NOT AGREE TO REDUCE THEIR EXCLUSIVE TIME TO FILE A PLAN OF REORGANIZATION. This was a blatant lie, we did not authorize this motion and did not receive notice of it; and the bank violated debtors' automatic stay by endeavoring to acquire the debtors' exclusive time, causing harassment of the debtors and in obtaining a judgment order. This is another void order.

4. The Order of November 5, 1992, granting Motion to file plan by First National Bank of Hooker. ORDERED that debtors' 120-day period to file a plan is reduced December 21, 1992, and the 180-day period within which debtors' may gain acceptances of such plan is reduced to March 1, 1993. It is further ORDERED that agreed reductions shall not be extended without written consent of both debtors and FNB of Hooker.

5. The First National Bank of Hooker violated debtors automatic stay by all their acts in controlling or acquiring debtors in possessions rights, such as debtors exclusive time in which to file a plan, in demanding more than adequate protection of cash collateral, in motion and granted order to examine nondebtor Tom Eike and ordering him to produce all documents and papers that in any manner deal with his work for the debtors, including but not limited to financial projections, working papers, reports submitted to financial institutions and prospective lenders, letter to/from the debtors.

Tom Eike was an FMHA packager. He helps farmers prepare government required documents which the Dormans needed in early 1992 to help the Dormans to qualify for guaranteed government loans. Marc Conley, Sr. Vice President of The First National Bank of Hooker told the Dormans to present the guaranteed loan package elsewhere and although he signed "Yes", on a document which is presented to

lenders to see if they would consider making the Dormans a guaranteed loan; he told his bank that the Dormans' plan would not cash flow. He did not want the package presented to him, yet, he used the bankruptcy court to receive all the documents to prepare for their pending foreclosure action against the Dormans.

6. 12-22-92, The First National Bank of Hooker violated the debtors stay by subpoena of nondebtor Lonetree, Inc. and thereby piercing the corporate veil. This was not creditors right since Lonetree, Inc. did not have any of bank's collateral, neither was The First National Bank a creditor of Lonetree, Inc. Violation of debtors' rights by violation of debtors automatic stay.

7. The First National Bank of Hooker did not move the court to lift the debtors' automatic stay before "taking" debtors' rights.

From the first, the debtors' attorneys were in collusion with the bank's attorneys, with the trustee and trustee's attorneys and the lessors' attorney. When the Debtors tried to protect their rights and object to the bankruptcy, Judge Paul B. Lindsey about all these various unauthorized agreements between the attorneys and how they were all in agreement - he looked around and said, "Yes, they were in agreement. That they agreed that we should be liquidated and that liquidation was best for the creditors and for us."

1. Our attorney and bank's attorney agreed to reduce debtors' exclusive time to file plan. Michael Bickford states in the transcript, on page 60, third page up of February 23, 1993, "By agreement on the entry of the order appointing a trustee, my client agreed not to file a competing plan until after March 1st. So it's not because of the statute, it's because of an agreement that we have put off the time for filing a competing plan.

2. Debtors attorney and bank's attorney agreed that debtors' attorney would retain the estate's cash collateral in their trust account - there was later a discrepancy in amount, plus attorney did not receive permission from court to use money from trust account.

3. Bank wanted trustee appointed to take control of property and estate.

4. Lessors attorney inform debtors' attorney that lessors have received telephone death threats.

5. December 8, 1992, debtors attorney files Motion for Extension of time to assume or reject leases - one day out of time; then neglects to present an order for the judge to approve.

6. Court clerk and court neglected to deny the filing of the untimely Motion to Extend, and the judge omitted through inadvertence or mistake to Strike the Motion when an order was not presented

according to the court's own local rules. Twenty days would have been stricken on December 28, 1992. (Assuming the judge was correct in vacating his Extension Order and in further ordering the "Surrender Order"; then the order should have been confirmed nunc pro tunc, retroactively to either December 8, 1992 or December 28, 1992; rather than February 23, 1993.)

7. Debtors' attorneys lied, tricked deceived the Dormans endlessly. Kirk tormented us relentlessly, putting us under tremendous stress, duress, and fear with undue pressure, intimidation. He even had us fighting each other because he had caused so much fear. He questioned us about telephone death threats which the lessors had reported to their bankruptcy attorney; Stephen Elliott. He questioned us about irrigation pipe which we had allegedly run over; he informed us that we would have to prove that we were not incompetent and that we did not grossly mismanage our farm. That we would have to provide from five to seven local farmers, who would testify that we were good farmers; that even if we went to court the judge would appoint a trustee, anyway, and it could be someone that wouldn't work with him and Charles Underwood. Someone that wouldn't get along with them.

Jack had promised to help us get our plan confirmed and Kirk assured Wilma, "He promised not to sell you out." No

one would believe what he put us through; in his influencing us to seek help from Jack Cornelius.

He just plain scared Wilma into reluctantly - against her better judgment and will - and even against her husband's warnings not to listen to them. (They even had us fighting each other. John got so upset emotionally and physically that it effected not only his emotional heart, but his physical heart as well. He came under so much duress, stress that he had to back off from the bankruptcy court actions or it would have killed him. (Wilma has thought she was going to have to call the ambulance twice; he was in so much pain.)

Wore down, Wilma agreed to hire Jack Cornelius for $75.00 per hour for no more than two months; then the attorneys would discharge him. Kirk had alarmed the Dormans by telling them that the lessors were trying in every way to get their land back; making all kinds of false accusations and the bank was doing the same. And debtors' attorneys put the Dormans through duress, and unduly pressured them relentless because the debtors attorneys knew that they had not protected the leases as the debtors had explicatedly instructed them to.

8. Debtors attorney and bank's attorney get an approved order appointing a specific trustee, Jack Cornelius. (It couldn't be anyone else - it had to be Jack because he would work with them.)

9. On February 3, 1992, U. S. Trustee's attorney, Mark Troppoli agree to present Judge Lindsey an order naming Jack Cornelius as a disinterested person - for the record. This order is filed February 4, 1992

10. Before Jack Cornelius is appointed as trustee and before the court approved "agreed to" order is filed; an application for order by Jack Cornelius to Employ John R. Hughey and Karla Finnell as attorneys to assist trustee is filed. Untimely?

Even before the Dormans had filed their petition for relief, Charles Underwood had been bringing up two people at various times: Jack Cornelius and Stephen Elliott so the Dormans knew of them and knew their names well before ever meeting them.

Could it really be a coincidence that these very two would end up in the same case? That Elliott would end up being the Dormans' landlords attorney and that Charles Underwood would work things out so that Cornelius would be the trustee and that the trustee's attorney, John Hughey would be the one to inform Elliott that the motion to Extend was not timely and that the Debtors' attorney had not presented an order to the court.

Elliott states that he is the one that informs debtors' attorney that an order has not been granted - that he knew

about it since early January and had kept silent until Cornelius was appointed as trustee; he then proceeded to get the leases rejected.

Debtors' and bank' attorneys get Cornelius appointed as trustee on February 4, then, on February 5, debtors' attorney files a second Motion to Extend; Then on February 8, debtors' attorney is granted an order that stands out like a sore thumb.

This order was used as the focal point to use the court system to liquidate the Dormans. Everything was in place. The trustee was appointed to have control of all the assets, the trustee and his attorney, John Hughey would not bring a litigation against the debtors attorney, and they would make sure that the Dormans would not be able to, by trustee claiming the lawsuit for the estate, if it came to that. By the time lawsuit would be abandoned to the Dormans they won't have enough money to hire a monkey. And like Hughey said lawyers are reluctant to sue another lawyer.

Now then, on February 16, Elliott runs to Judge Paul B. Lindsey's chambers with an application requesting a prohibited an ex parte order shortening the response time to his motion to vacate order extending time to assume or reject leases and Motion for order compelling immediate surrender of property and that the court would set the hearing for February 26 to at the same time as the

hearing on confirmation of the Debtors' plan of reorganization.

Judge Paul B. Lindsey marked through the 26th date and inserted 23 on Elliott's application, then he granted an ex parte order which shortened the response time to 5 days from the date hereof and set the motions to Vacate and Motion compelling Immediate surrender of property for the 23rd day of February.

The Motion demanding the judge to vacate his February 8 Extension Order because the original motion filed December 8, was not filed timely - it was filed one day late; therefore the leases were deemed rejected. He further demanded an order compelling the trustee to immediately surrender the property (1700 acres of farm and grass land), claiming that he had not received a certification of service by the debtors' attorney, therefore he had not objected earlier. But, he states, the bank's attorney had been keeping him informed.

As Elliott brought up in a later pleading, the debtors' attorneys did not object or protest, very much, to the ex parte order or to the shortened 5 day response time and both the trustee's attorney. Neither did he protest or object to Elliot's allegation that the Extension Motion was filed one day late. In fact, he talked like it was; that he did not like it - that the Judge did not like it. He laid it at his door and at the door of his office; he pleaded with

the judge not to penalize the debtors; that if the judge was angry to penalize him. He apologized in court to the judge.

Judge Paul B. Lindsey states how the Court probably should have noticed it and inquired about it; in other words he does not consider what he signs - he rubber stamps them. In our case he was gone three times that we know of - two weeks at a time; circuit riding

Judge Paul B. Lindsey based his opinion on BRAYSHAW citing 4003B and 9006, although as he states it is not controlling. This is the second time because he quoted it another time in one of the debtors' other hearings)

Hughey states that in all of the three pleading that none of them could say what the law was and that; Kirk informs the judge that is a jurisdictional question of law and Hughey states how he found one cite in Utah that has a footnote that recognized waiver and estoppel. He brings up Conrad Duberstein and how he states that 365 (d) 4 is put in the code to benefit the lessors and that they can waive it and that such rigid construction of the law brings in the common law principles of waiver and estoppel. Bad cases make bad law.

The U. S. Trustee's attorney just a party in interest.

Cornelius states how central the leases are to the reorganization plan that without the leases it would not cash flow and would have to be remanded to a...Judge Paul B. Lindsey interrupts him and adds, "Liquidation." And Cornelius changes what he was going to say to finish, "...to a liquidation plan, yes, sir.

CONCLUSION

Respondents state that events occurred while appeal was pending that made relief unavailable, that the only question before the court is the moot question.

Petitioners contend that events occurred below which were orchestrated to obstruct justice and to hinder the rehabilitation of the Chapter 11 reorganization plan. That there have been so many illegal, unlawful, clearly erroneous court approved unauthorized agreed to orders and violations of the debtors automatic stay and the violation of their Constitutional rights and due process, that there is no way that the Supreme court can determine that this writ of Certiorari should be dismissed. The issues are not moot, and the Dorman's petition is not frivolous.

We rest our case on the attached transcripts and on the attached cite as authority that all judicial actions and proceedings against debtors initiated while stay is in effect are void *ab*

initio. Bankr Code 11 U.S.C.A. 362. In re Joseph P. Cappadonna v Howard Sav. Bank, N/K/A First Fidelity Bank, N.A Cite as 154 B.R.639 Bkrtcy D. N. J. 1993).

Unless bankruptcy court grants relief from automatic stay, all judicial actions and proceedings against debtor initiated while stay is in effect are void ab initio. Bankr. Code 11 U.S.C.A. 362.

The vacating and "surrender Order" obtained by the lessors, Pauline Jones and Ann Ell Westbrook after the filing petition of relief under Chapter 11 for Reorganization was void ab initio as obtained in violation of stay. As this matter goes to issues involving property of the estate and the automatic stay, it is a core proceeding as defined by Congress in 28 U.S.C. Sec 157 *et seq.* The within opinion constitutes findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

If the violation of the automatic stay was not enough; the "Surrender Order" was also void *ab initio* due to the bankruptcy court's own local rule 12(h)(4), if an order is not submitted and filed within twenty days of the expiration of the response period, the motion will be stricken.

Affirmance of the District court a departure by the Tenth Circuit from the accepted and usual course of judicial proceedings, and did sanction such a

departure by the lower court and does implicate special and important reasons for granting review. The Dormans' Petition for a Writ of *Certiorari* should be granted.

The Dormans further demand the reversal of subsequent orders, most especially the order confirming the trustee's liquidation plan which was filed May 26, 1993. and that all property be returned to rightful owners, including all lands, sons' estate, minerals, proceeds from sale of cattle (to date), machinery and equipment, and the assets of the nondebtor de jure Oklahoma corporation, Lonetree, Inc., proceeds from sell of cattle (to date), crops (to date), ASCS payments (to date, damages, punitive damages, loss of income, future income, restoration of personal property of nondebtors, restoration of fixtures, heirlooms, Christmas gifts, our credit history and good name.

Respondents request the right to file appropriate lawsuits, and request an extension of time, stay or injunction about pursuing the rights, of the estate, debtors and other injured parties. And respondents demand the court to issue a Writ of Restitution and or a writ of Execution and an award of damages, costs and whatever else the court deems proper, correct and equitable.

Therefore, the Dormans, young and old, pray to their Heavenly Father God,

in Jesus's holy name, that the Dormans' Petition for a Writ of Certiorari be granted, otherwise gross miscarriage of justice would occur. And that the Dormans be granted such further relief as the court deems proper, and just, including an award of damages.

Respectfully submitted in Christ Jesus's name.

John C Dorman

Wilma L. Dorman

John C. Dorman
Wilma L. Dorman
Route 1, Box 89
Forgan, OK 73938
405-259-6488

Petitioners are representing themselves.

APPENDIX

In the United States Bankruptcy Court For The Western District of Oklahoma

Filed July 14, 1993
In RE:
JOHN C. DORMAN AND) No. BK-92-16654-C
WILMA L. DORMAN,) Chapter 11
Debtors

JOHN DORMAN)
WILMA DORMAN,) ADV. # 93-01141-C
Plaintiffs)
vs.
JACK CORNELIUS,)
TRUSTEE Defendant)

JACK CORNELIUS)
TRUSTEE Plaintiff) ADV # 93-01173-C
)
vs)
)
JOHN C. DORMAN AND)
WILMA DORMAN)
Defendants)

TEMPORARY INJUNCTION

This matter comes on to be heard upon the Court's own motion pursuant to 28 USC Section 1651 (a) and 11 USC Section 105(a) and pursuant to the decision of the Tenth Circuit Court of Appeals in Tripati v. Beaman, 878 F2d 351 (10th Cir. 1989), IT IS ORDERED, ADJUDGED AND DECREED that debtors herein are temporarily enjoined and restrained from filing any pleadings in the above

described case or adversary proceedings or from filing any new adversary proceedings related to the above case unless represented by an attorney authorized to practice law in the State of Oklahoma and the United States District Court for the Western District of Oklahoma, or, if acting prose, without first obtaining leave of Court

Dated this 14th day of July, 1993.

/S/Stephen J. Covey
U. S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
FILED: JULY 14, 1993

IN RE;		
JOHN C. DORMAN AND	)	
WILMA L. DORMAN	)	
Debtors	)	Case # Bk-92-16654-C
	)	CHAPTER 11
JOHN AND WILMA	)	
DORMAN	)	
	)	Adv. # 93-01141-C
Plaintiffs	)	
vs.	)	
	)	
JACK CORNELIUS	)	
TRUSTEE	)	
Defendant	)	

JUDGMENT ORDER

This matter comes on to be heard upon the Complaint for Declaratory Judgment determining that certain asses are not property of th bankruptcy estate filed by John and Wilma Dorman, Debtors, against Jack Cornelius, Trustee, and the Motion for Summary Judgment filed by the Trustee, Debtors' Response to the Motion for Summary Judgment, and the Reply of the Trustee to Debtors' Response. The Court having considered all of the pleadings finds as follows.

1. The facts as stated in the Trustee's Motion for Summary Judgment are uncontroverted by Debtors.

2. There are no material questions of fact and summary judgment is appropriate.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of the Trustee is granted and the Court declares the following property to be property of the estate.

a. All crops planted after October 8, 1992.

b. All government payments associated with crops planted after October 8, 1992.

c. All crops growing upon the leases deemed rejected.

d. All claims against Charles R. Underwood, D. Benham Kirk, Jr. and/or Underwood, Bardrick & Kirk.

Dated this 14 day of July, 1993.

/S/Stephen J. Covey
U. S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE
JOHN C & WILMA L. DORMAN
Debtor(s) Case # 92-16654-C
Adv No. 93-1215-C

The enclosed documents was forwarded to the bankruptcy clerk from the district court clerk's office. Our office has been ordered not to file any pleadings of documents received from you without first obtaining leave of court, please reference the enclosed order. Should you have any questions please call me at 405-231-5146.

Sincerely,
/S/Mile Bailey
Generalist Supervisor

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:)	Case No. BK-92-16654-C
JOHN C. DORMAN)	CHAPTER 11
WILMA L. DORMAN)	
Debtors)	
_____	
JOHN AND)	
WILMA DORMAN)	Adv. # 93-01141-C
Plaintiffs)	
vs.)	
)	
JACK CORNELIUS)	
TRUSTEE)	
Defendant)	
_____	
JACK CORNELIUS)	
TRUSTEE)	
Plaintiff)	Adv. # 93-01173-C
vs.)	
)	
JOHN AND)	
WILMA DORMAN)	
Defendants)	
_____	
JOHN C. DORMAN)	
WILMA L. DORMAN)	
Plaintiffs)	Adv. # 93-01215-C
vs)	
THE FIRST NAT'L)	
BANK OF HOOKER)	
JACK CORNELIUS)	
TRUSTEE, AND)	
PAUL B. LINDSEY)	
BNKRPCY JUDGE,)	
U. S. EMPLOYEE)	
M. BICKFORD)	
S. ELLIOTT)	

K. FINNELL)
J. HUGHEY, ALL)
ATTORNEYS AND)
DOE(S) 1-100)

PERMANENT INJUNCTION

This matter comes on to be heard upon the Court's own motion pursuant to 28 U.S.C. Section 1651 (a) and 11 U.S.C. Section 105 (a) and pursuant to the decision of the Tenth Circuit Court of Appeals in *Tripati v. Beaman,* 878 F. 2d 351 (10th Cir. 1989), and pursuant to the Order to Show Cause filed by this Court on July 14, 1993, IT IS ORDERED, ADJUDGED AND DECREED that Debtors are enjoined and restrained from filing any pleadings in the above described case or adversary proceedings or from filing any new adversary proceedings related to the above case unless represented by an

---

1 (footnote) Title 28 U.S.C. 1651 (a) provides as follows:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 105(a) provides as follows:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be

construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

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attorney authorized to practice law in the State of Oklahoma and the united States District Court for the Western District of Oklahoma or, if acting prose, without first obtaining leave of Court.

Dated this 21 day of July, 1993.

/S/ Stephen J. Covey
U. S. Bankruptcy Judge

In The United States Bankruptcy Court
For the Western District Of Oklahoma
In the Matter of
John C. and Wilma L. Dorman
Debtor
Case No. 92-16654 Ch 11

Transcript of
Proceedings had on the 3rd day of
February, 1993, held in the sixth Floor
Courtroom of 201 Dean A. McGee Avenue,
Oklahoma City, Oklahoma

Before: The Honorable Paul B. Lindsey,
United States Bankruptcy Judge for the
Western District of Oklahoma.

Appearances:

For the debtor:	Mr. D. Benham Kirk, Jr. Mr. Charles R. Underwood Attorneys at Law 1001 N.W. 63rd St. Oklahoma City, OK
For First Nat'l Bank of Hooker	Mr. Michael Bickford Attorney at Law Bank of OK Plaza Oklahoma City, OK
For Pauline Jones and L. Westbrook	Mr. Stephen P. Elliott Attorney at Law Oklahoma City, OK
For U. S.	Mr. Mark Toffoli

Trustee Attorney at Law
Fourth Floor
201 Dean A. McGee
Oklahoma City, OK

Mary Garvin,
Rpr Court Reporter

Simmons Computer Transcript
8401 E. Memorial Road
Jones Oklahoma 73049
396-2812 789-0932

Proceedings
February 3, 1993

The Court: 92-16654, John C. and Wilma L. Dorman. You waited all this time to provide me with an agreed order?
Mr. Kirk: In part, Your Honor.
The Court: Oh.
Mr. Kirk: Ben Kirk and Charles Underwood for the debtors.
The Court: You might have understood by now that this has not been a good day for anybody.
Mr. Kirk: I sensed that, Your Honor. We'll try to be brief.
The Court: All right.
Mr. Bickford: Mike Bickford on behalf of the First National Bank of Hooker.
Mr. Toffoli: Your Honor, Mark Toffoli for the United States Trustee.
Mr. Elliott: Steve Elliott on behalf of Pauline Jones and L. Westbrook.
Mr. Kirk: Mr. Cornelius is back there as well, Your Honor.
The Court: I see him.
Mr. Kirk: Okay. Your honor, with respect to the motion to appoint a trustee, and

the debtors' response, and our position to the same, that has been resolved, as we indicated in a conference call earlier this week with the court. The debtor have consented to the appointment of a trustee. We have been in consultation with counsel for the movant and Mr. Toffoli with the U. S. Trustee;s office, and I believe we have everything worked out, and have an agreed order to present to the court.

The Court: All right. I wondered whether there was going to be a direction by the court as to who it had to appoint.

Mr. Toffoli: Your Honor, you're quite correct. The way the statute and the Bankruptcy Rules ar now structured, the Court orders a trustee be appointed, and make the appointment. Then, Your honor has to approve that appointment. I'll have the appropriate application and order to Your Honor today.

The Court: That's fine. I wouldn't have signed it if it had been left in there anyway.

Mr. Toffoli: For the Record, Your Honor, Mr. Cornelius will be named as the Chapter trustee.

The Court: All right.

Mr. Kirk: Your Honor, that leaves the remaining issue on today's docket being that of the approval of the debtor's disclosure statement. I believe there are only two objections which have been filed. Sorry, three. One by J. I. Case; one by Mr. Bickford's client, First National Bank of Hooker; and that of the office of the U. S. Trustee. The parties, I believe, are in agreement that

an attempt will be made to reach an agreement on the language for the disclosure statement within the next 24 to 48 hours, and we'll submit, hopefully, an agreed order approving that disclosure statement. It's our intention to do everything we can to resolve the objections amicably by including the language that they want or language to that effect.
The Court: They have not been resolved as yet:
Mr. Kirk: No, they have not, Your Honor. We have been talking. We don not have a draft yet. It's being revised this morning. we worked on it some yesterday.
The Court: But you have no doubt but that resolutions will be obtained.
Mr. Kirk: I believe that to be the case, Your Honor.
The Court: Do you feel that way?
Mr. Bickford: Yes, Your Honor. I believe we can work -
The Court: Does Mr. Gooding feel that way? He's not here. He's usually here when he has a problem.
Mr. Kirk: I might tell the court that I spoke with Mr. Gooding by telephone this morning. I tried to call him yesterday, and he was out of town. He returned it this morning. I asked him, since his objections essentially incorporated the objections of the other two objecting parties, that if we satisfied them with respect to the disclosure statement, if he in turn would be satisfied. And he advised that would be the case.
The Court: All right. I'll give you 72 hours to resolve it and get an order to

me signed off on by everybody who is objecting.
Mr. Kirk: Your Honor, that takes us into the next potential phase of this case, notwithstanding the appointment of the trustee. And, if the Court would recall, the debtors; period in which to obtain acceptance of any plan that they might propose expires on March 1st. For that reason I would like to know if the Court would entertain setting a confirmation hearing.
The Court: The exclusivity period may expire. Or do we have an absolute deadline set in this case?
Mr. Kirk: We had a reduced time with respect--
The Court: All right.
Mr. Kirk: - to the exclusivity and acceptance, Your Honor.
The Court: All right.
Mr. Kirk: Obviously, the trustee and his counsel will want to have some input into this process, but for purposes of today, I would like to know if the Court would set a tentative confirmation hearing, assuming we present an agreed order regarding the approval the disclosure statement with the 72 hour parameters that the court has set, that the Court would entertain shortening of the notice of the confirmation hearing so that we could have our confirmation hearing and that he debtors could have an opportunity to try to gain acceptance before that period expires.
The Court: What is that date:
Mr. Kirk: March 1st.

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

56 & 57

March 1st is that other parties in interest may file competing plans.
The Court: Well, I can control that. I can't control their filing it, but I can sure control whether they screw up the process while doing it.
Mr. Bickford: Your Honor, I believe that's where we'll be in this case. I don't want to mislead the Court. I believe if it goes past March 1st. Which is the date that the debtor agreed to in the cash collateral order, and that my client agreed to, and the Court approved, there will, in fact, be competing plans, at least one that will be filed, and there possibly will be others. So that is the case. I don't want to mislead the Court.
The Court: Mr. Cornelius, if you have the opportunity to look at the property in question, review the disclosure statement and plan, presumably you are going to have -- you're going to ask for the employment, for the authorization to employ counsel in this regard -- if you and your prospective counsel have had the opportunity to go over the documents that have already been filed, even though the Court's shortened time, you will still have the opportunity to object to confirmation of the plan in any event. The only thing you would not have is the opportunity to object to approval of the disclosure statement. Is that going to disadvantage you unnecessarily?
Mr. Cornelius: It will not.
The Court: In that case I'm going to shorten the time on the filing of objections to confirmation. This is

assuming that I get an order before close of business on Friday, approving he disclosure statement, which order should include the following dates: Disclosure statement and plan should be transmitted to all creditors with sample ballots and balloting instructions. I assume you can be ready to do that no later than Monday; is that correct?
Mr. Kirk: We will make that work, Your honor.
The Court: No later than February 8. Ballots will be required to be returned no later than February 26. Objections to confirmation will be required to be filed -- I just thought of a problem. I'm going to be in Tampa, Florida, from the 28th of February to the 13th of March, working six days a week, I might add. Does that mean we have to have this confirmation hearing on the 26th: The order that I signed says you have to obtain acceptances before the 1st of March. It doesn't say the plan has to be confirmed by the 1st of March. Is that right?
Mr. Bickford: Your honor, I believe that's the language in the statute. It's 1121.
The Court: You can obtain acceptances well in advance of the hearing on confirmation. Well, that is the language in 1121, whatever that section is.
Mr. Bickford: What I think the import of that is, is that a party in interest, if they have not received, the plan has not been accepted by all classes by that time, then competing plans can be filed.

The Court: You're saying that presupposes that a hearing be held at which that has been demonstrated? I'm not--
Mr. Bickford: Frankly, I don't know what that means, but it says that no hearing is necessarily required, but I guess if there were unanimous acceptances, that a competing plan could be -- by each class - that a competing plan could be filed.
The Court: Mr. Kirk, will you be ready for a confirmation hearing on the 26th?
Mr. Bickford: If that's the only choice we have, Your Honor.
The Court: That's the only choice you have. So i'm going to require that the plan be transmitted along with the disclosure statement, ballot, and ballot instructions by February; that the tie be shortened for the filing of objections to confirmation and for the return of ballots February 24, close of business, February 24, and that a hearing on confirmation be held a 9 o'clock a.m. on February 26.
Mr. Kirk: Your Honor, May I ask the Court;s consideration of the change in one of those dates?
The Court: What's that:
Mr. Bickford: The general process within this district is that objections to plan confirmations are filed, and then the parties may have some opportunity to try to resolve them in advance of the confirmation hearing. And with that in mind I'd like to know if the Court would entertain objections being filed by the 22nd, so that we would have sufficient time to try to negotiate with creditors.

The Court: That's only two weeks after you would have mailed. It's less than two weeks after they have received the plan and disclosure statement. That's an awfully short fuse.
Mr. Kirk: In that case, Your Honor, may we have in the order that the objections are to be transmitted to our office by facsimile as opposed to mail, so that we-
The Court: Facsimile and --
Mr. Kirk: And mail. So that we can see them as soon as possible?
The Court: You can put that in there. Put your fax number in there. This is an awfully short fuse, anyway, and i'm not real comfortable with it. I would have liked it a lot better had you rushed the disclosure statement hearing so that we would have had enough time before March 1. But that didn't happen.
Mr. Kirk: Well, there are some dynamics at work here, your Honor, and we just have to deal with them.
The Court: Well, it certainly sounds like it.
Mr. Kirk: We may not be able to get it done, but we'd like to have our opportunity.
The Court: It's going to be interesting to me to see what Mr. Bickford's client is going to do with a plan that is filed two days before a confirmation hearing on one a previous one was held, if that occurs.
Mr. Bickford: I think I'm unclear --
The Court: I;m just saying, if we don't make it by March 1 and your client files a competing plan, it is unlikely I'm going to delay the other plan's

confirmation if that hasn't happened before March 1, while yours goes through the entire process of disclosure statement, balloting, and confirmation.
Mr. Bickford: All right.
The Court: Now, that is not necessarily a word to the wise, but it puts the Court in difficult situation. But we'll try to get it done on the 26th.
Mr. Bickford: All right, your Honor.
The Court: If not, I, except in extreme All right, your honor. Except in courtroom emergencies, I'm going to advise everybody that you're not to go to some other judge in this courthouse and try to get anything accomplished in ths cas while i'm gone without making every effort to contact me first. Thank you.
Mr. Bickford: Thank you, Your Honor.
(End of Proceedings)
Certificate
I, Mary Garvin, CSR, RPR for the State of Oklahoma, do hereby certify that the above-entitled matter was reported in machine shorthand by me, and said machine shorthand notes were later reduced to manuscript form, and that the foregoing pages contain a true and correct transcript of the matter had as aforesaid.
/s/ Mary Garvin, CSR, RPR

In The United States Bankruptcy Court For the Western District of Oklahoma

In the matter of: John C. and Wilma L. Dorman, Debtors Case No. 92-16654 Ch 11

Transcript of Proceeding had on the 23rd day of February, 1993, held in the Sixth Floor Courtroom of 201 Dean A. McGee Avenue, Oklahoma City, OK

Before: The Honorable Paul B. Lindsey, United States Bankruptcy Judge for the Western District of Oklahoma

Appearances:

For Debtor:	Mr. Ben Kirk
1st Nat'l Bank Hooker, OK	Mr. Michael Bickford Bank of Oklahoma Plaza Oklahoma City, OK
Ch 12 Trustee	Mr. John Hughey 500 Bank of Oklahoma Oklahoma City, OK
Pauline Jones and L. Westbrook	Mr. Steven Elliott Attorney at Law Oklahoma City, OK

Mary Garvin, RPR
Court Reporter

PROCEEDINGS
(February 23, 1993)
The Court: 92-16654, John C. and Wilma L. Dorman. Appearances, please.

Mr. Elliott: Steve Elliott on behalf of Pauline Jones and Ann Westbrook.
Mr. Bickford: Mike Bickford on behalf of First National Bank of Hooker.
Mr. Hughey: John Hughey on behalf of Jack Cornelius, trustee.
Mr. Kirk: Ben Kirk, Your Honor, on behalf of the debtors.
The Court: All right. This is a motion to vacate order extending tie to assume or reject executory contracts and/or expired leases, and motion for order compelling immediate surrender of the property by Pauline Jones and Ann L. Westbrook. Mr. Elliott, it;s your motion.
Mr. Elliott: Your Honor, pre-petition my clients leased approximately 1600 acres to the debtors. An order for relief was entered in this case on October 9, 1992. Sixty-one days later there was a motion for extension of time to extend time to assume or reject. Under 364(d), under our reading of that, that means that there was an automatic rejection of those leases at that point, so it wasn't a timely motion to assume, or reject, or extend. After that time the trustee was appointed on February 4, 1993, I believe. Subsequently, the debtors, who were no longer the representative of the estate, filed another motion for an extension. I discovered either in mid or toward the end of January that an order had been entered well after the time on the first motion for an extension; and, in fact, were granted that. That brought my motion for th vacation and the immediate surrender on file. I believe under the

facts of this case 564(d) requires that those leases have been rejected and that we're entitled to immediate surrender of th property.
The Court: Mr. Kirk.
Mr. Kirk: If the Court will please bear with me, I'm somewhat anxious about this presentation, more so than I might normally be. As I perceive the issue before the court, Your honor, the legal question is whether or not 365(d) (4) is jurisdictional with respect to the automatic rejection provision thereof. I've presented the Court with a response yesterday in which I elaborated to some degree on a line of cases which suggest that the bankruptcy court is court of equity notwithstanding the operational provisions of 365(d)(4) that either extensions may be granted out of time or the right to assume leases may be granted out of time by the Court under the equitable doctrines of waiver and estoppel I'm not here before the Court today to try the issues of waiver and of estoppel, my interest today, Your Honor, is urging the Court to adopt the logic of those cases, which finds that waiver and estoppel may, in fact, apply in tis scenario and may give the court the ability to operate out of time of the original 60-day period notwithstanding 365 (d) (4). This is, to the best of my knowledge and belief, Your Honor, an issue of first impression within the state of Oklahoma, and I find no reported decision out of the
tenth Circuit Court of Appeals in this regard. I believe, Your Honor, that if

the Court examines the logic of the line of cases cited in the response, notably the *Lew Mark Cleaners Corp.* case in which Judge Duberstein goes to great length to explain the rationale for applying waiver and estoppel to get past this seemingly jurisdictional barrier under 365 (d) (4), that this is the better view. And I'd ask the Court to adopt it today. I need to address, Your Honor, some of the facts as it relates to my responsibilities or lack thereof in the context of this case. The issue relating to the motion to assume or reject or alternatively to extend the time was addressed with members of Mr. Elliott;s firm. They were advised that I was going to tile a motion to extend the time, and I did so. Regrettably and unbeknownst to me until only very recently, the motion was filed on the 61st day. I'm not happy about the situation. I'm sure the Court is not. But when it was brought to my attention that the motion itself was untimely, I discovered that no one had presented an order. The order was presented to Your Honor with the following explanation, as I recall, and I would not presume to deceive this Court in any manner. I've practiced here a number of years. It has never been my intention in any way, shape, or form to practice nay type of deception, especially before Your Honor. I presented the order and advised at the time that there were parties that suggested or had raised the issue that the motion to extend may not have been timely filed, but that not one had objected. The court advised that you

would not, you would enter the order, there being no objection filed, or no other communication to the contrary, but that you would not permit me to hide behind the order and use it as a sword, at which time I indicated to the Court I fully understood that, but that I would be asserting issues related to estoppel and other possible defenses if it became an issue. It was my understanding that the Court was in accord with that viewpoint, that on that basis the Court entered the order and the order was filed. We have ad some problems in the handling of this case with our office. And although I don't consider myself a hundred percent at fault in the situation, I'm the attorney who was largely responsible by default for handling these matters, so I have to accept responsibility. This is a farm bankruptcy reorganization proceeding, Your Honor. And the lease ground which Mr. Elliott's clients are wanting back now, the crops have already been planted, and it represents about one-half of the acreage involved in reorganization efforts before the Court. I believe that this case is reorganizable. I believe with modifications that the trustee believes that to be the case. I ask the Court --- and this is difficult for me to say, Your Honor, I apologized - but I ask the Court, if the Court;s angry, or upset, or inclined to penalize anyone in third cas, that I'm the one standing before the Court that should be penalized and not the debtors. The trustee has an interest in these leases and these leased

grounds The creditors do. And in the cas of in re Bonton Restaurant and Pastry Shop, Inc., at 52 B.R. 850, Your Honor - I want to read to you the following footnote at page 853: "Assumption of a valuable lease is as much in the interest of creditors as it is in the interest of the debtor. The court notes that a deemed rejection may be a product of collusion, or the debtor-in-possession's malfeasance, negligence, or mistake, which may improperly penalize creditors for th debtor's failure to act. It would appear, therefore, that the circumstances surrounding the deemed rejection that is contested by a party in interest be taken into account by the Court."

The point being, Your Honor, that if you find that 365(d) (4) in this case is jurisdictional as a matter of law and do not afford the debtors an opportunity for an evidentiary hearing on application of doctrines of waiver and estoppel, you're not just penalizing the debtors, you're penalizing the other creditors in the case as well. I ask the Court to be mindful that this is, indeed, a Court of equity founded on equitable principles, and I leave it in you hands.

The Court: Mr. Hughey. You have filed on behalf of the trustee a response, which, as I read it, pretty tracts Mr. Kirk;s response.

Mr. Hughey: That's correct, Your Honor. And I don't think in either of our briefs or any of th three pleadings that were filed, could nay of us say what the law was int his jurisdiction. There is one case within the Tenth Circuit, and it's a

Utah case, that has a footnote that recognizes the doctrine of waiver and estoppel, but that;s the only thing locally we can find. There are three excellent Southern District of New York opinions, one, Conrad Duberstein --
The Court: That's the Eastern District.
Mr. Hughey: Eastern District. I'm sorry. What did I say? Southern?
The Court: Yes.
Nr. Hughey: Eastern District. The logic that Mr. Duberstein used was that if the court was bound to follow in every instance the doctrine of a very rigid construction, it would defeat the purpose that was put into the Code by the Congress in that these provisions were put there to benefit the lessors, and, obviously, if it's put there for the lessors, then they can waive it. And, so, I don't know what the law is. I do know the facts are very tough in this case. It would be Mr. Cornelius's testimony, I'm sure, that these leases are absolutely central to this reorganization. And had cases make bad law, or I think that it's in these cases like this that the rigid construction of the Code bring in the common law principles of waiver and estoppel. I believe that's really all the remarks I would have about it.
The Court: Mr. Bickford.
Mr. Bickford: Your Honor, my client has no position in this matter. We're just here as a spectator.
The Court: All right. The Court notes the appearance of Mr. Toffoli of the office of the United States Trustee.

Does the trustee have any input it wishes to make in this matter?
Mr. Toffoli: We do not, Your Honor. We're really here as a, just a part in interest.
The Court: Does the standing, does the trustee who has been appointed kind of late in the game, Mr. Cornelius, wish to be heard?
Mr. Cornelius: Your Honor, I would make a statement, yes. I've been to the farm, spent part of last week out there. I've had numerous discussions with ht economist, Mr. Mike Bertram, in the case. We've met with the bank and with the bank's counsel. And what Mr. Hughey represented to you is absolutely the truth, that these leases are important tot reorganization as a reorganization plan is drafted at the present time. There might be a few even minor changes at that, but at any rate, those leases are important. It the leases are not included in the property, with the property in the farm, we'll just have to go back to the drawing board and j=Completely redraft, and take a look at the thing, and see if it will cash flow without the irrigated land, because these leases cover all of the irrigated land. And if it will not, if you don't have the irrigated land, there's a good possibility it won't cash flow, and it would be, that it would be remanded to a --
The Court: Liquidation
Mr. Cornelius: - to a liquidation plan, yes, sir.

The Court: All Right. Mr. Elliott, you may respond.
Mr. Elliott: Your Honor, I hear everybody talking about waiver and estoppel, but I don't hear them saying exactly what it is that's been done or should have been done that constitutes waiver or estoppel. Certainly, if the indications by Mr. Pringle of my firm that the original extension would not be opposed, if that's going to constitute either estoppel or waiver, then certainly the ?court has the basis to rule on that. That, in fact, did occur. As to any other facts and circumstance that would fall under the waiver or estoppel category, frankly I don't know what those are. So it's very difficult for me to respond to those. I do think that there is a second issue here. We do have the motion being untimely. The second issue is that the period for assumption or rejection was extended to February 8. The only motion that was filed before the expiration of that time period was filed by the debtors, who were no longer debtor in possession. They were no longer the representative of the estate, and I'd certainly take the position that they don't have standing to seek that extension. The trustee did not seek an extension. So, regardless of the disposition of the first issue, it seems to me that the second issue pretty much leads to the same place. Those leases have been rejected.
The Court: All right. Mr. Kirk.
Mr. Kirk: Well, briefly, Your Honor, I should have in my presentation in chief

addressed what I consider to be the inapposite cases cited by Mr. Elliott in his response, and I will stand on discussion on those cases and why I think they're either inapposite or distinguishable from the case at bar as set forth in the response. I indicated to the Court, Your Honor, that crops were growing, had already been planted post=petition. Some have been harvested. We have continued to perform under the lease and done what we were required to do. The leases in question are not in default, so there's no issue of adequate assurance or anything looming out there. The plan itself, which was filed initially on December the 21st, indicated that all leases, all unexpired leases and executory contracts were going to be deemed accepted or rejected at the time of th confirmation, which I believe 365 allows. I think there ar, taking into account th fact that we relied on the representation of Ms. Jones and Ms. ??Westbrook's counsel that they would not object to at least the initial extension of time, and the fact that we've continued to perform under the leases and have given every indication that we intended to assume these leases, that would lay the foundation for waiver an/or most likely, estoppel, Your Honor, to be honest. I think that;s the direction we would be heading if we have full-blown evidentiary hearing.

The Court: Well, you had mentioned in your initial presentation, I believe, something on the order of, if the Court declines to grant the debtors and

evidentiary hearing -- have you asked for an evidentiary hearing? I thought this was going to be the hearing, whatever anybody wanted to put on.
Mr Kirk: My perception, Your honor, given the shortened notice and my discussions with Mr. Elliott that our initial concern before the court was the threshold legal issue relating to jurisdiction. And that --
The Court: Why don't you tell me -- apparently, Mr. Elliott has conceded that Mr. Pringle said that he did not, on behalf of his clients, that he did not intend to resist a motion to extend the time. That apparently is not at issue. What would an evidentiary hearing do: What would it provide in the way of additional facts?
Mr. Kirk: I think if the debtors would be able to testify, Your Honor, as to what they have done in connection with performance under the lease post-petition both within the initial 60-day period and beyond.
The Court: Do you know what that is? Are you going make an offer of proof: Now, you said you -- you mentioned the crops have been planted and the implication was that was to the debtor's detriment because they have expended sums in the belief that this lease would be assumed. But you didn't say when that occurred, and the timing, it seems to me may be important.
Mr. Kirk: The crops, Your Honor, were planted in the month of October and November for the following, for the coming crop year.

The Court: So that was during the 60-day period.
Mr. Kirk: Yes. But they ave also harvested milo since that time, delivered it to the elevator for the account of Mr. Elliott's clients. And let me launch into these facts here, Your honor. Understand that I don't have a full-blown offer of proof. But let me tell you what I think the testimony would show.
The Court: All right.
Mr. Kirk: With the understanding that there may be other facts out there yet to be brought before the court. They have paid pasture rents sometime very close in time to when the initial 60-day period expired. I don't know whether that is before or after. They have paid for bales that were swathed from the land belonging to Mr. Elliott;s clients. Mr.s. Jones has singed papers relating to milo for government payments resulting from the recently harvested ci=rops. They have gone to great lengths to negotiate the use of certain cash collateral, to use cash collateral to buy a place which is a sp=eparate contract, Your honor, but the same party buying it from Mr. Elliott;s clients. If they knew they were not going to be abl to keep the leases, they would not have gone to that trouble. And I don't think they would have, they would tell you that they would not have ad an interest in holding onto that homestead property that they're buying from Mrs. Jones. They continue to work the ground in connection with the ongoing crops. That's -- those are th things that come to mind, your Honor.

The Court: All right. Any response, Mr. Elliott?
Mr. Elliott: Very briefly. Your Honor, one thing you did not hear from Mr. Kirk was that there was any indication from our clients to the effect that they were perfectly comfortable with going forward with the leases, as having been suggested, at the petition date. There's never been an indication to him. There has been an indication we were willing to discuss the matter with them to see whether or not there was an agreed resolution to it. That hasn't occurred. And in terms of who responded to what and when, I was never served with anything by th debtors of no one in my firm was served anything by th debtors by February 5. That explains why there wasn't any more rapid action in this case than there has been.
The Court: That was the day that the second motion was filed.
Mr. Elliott: On or about the 4th or 5th. The 5th is when I received a copy of the second amended disclosure statement by telefax from Mr. Kirk. Prior to that time I had received no notice or anything from his office. All the servile that I had in this case had been from Mr. /Bickford's. office. In terms of payments and whatnot that may have occurred during the 60-day period, obviously, the debtor is required under 365 (d) (3) to continue performance. As to other matters, if they've been continuing to use these properties, we're entitled to an administrative expense under the case that I have read. And,

finally; in terms of any indication in the plan that there is going to be an assumption of these leases, as I said , number one, I never had a copy of that until February 5th; and, number two, 1123, which provides for assumption in context of a plan, expressly provides that that's subject to 365.

The Court: As Mr. Hughey has stated and is certainly clear from Mr. Kirk's presentation, this is a difficult case. And if the motion is granted, it will undoubtedly substantially disadvantage the debtors in coming up with a reorganization plan that can be confirmed. However, it is also clear to this Court that ht initial issue, as Mr. Kirk has also stated is the legal issue of whether the lease in this instance, which has admittedly been, or I assume it's admitted, the motion was filed on the 61st day, the language of 365(d) is pretty clear that you have 60 days or it's deemed rejected. The question then becomes whether or not there is some way for the Court to determine that deemed rejection was inoperative or whether there is a waiver or estoppel in the case. There are a number of things that I think I should address. First of all, I regret that I do not have any direct recollection of the conversation which Mr. Kirk says took place when I was presented the order on February 8. I have no doubt whatever but that what he says is exactly true. I simply have no recollection of it. Matters such as these are somewhat embarrassing to the Court because I think in the

circumstances, had the Court taken the time to count, the Court wouldn't have signed that order, because the motion was untimely filed. And the statute very clearly says, "such additional time as the Court for cause with such 60-day period." I might note that in the debtor's response they add the work "or" within such 60-day period, and the work "or" isn't in the statute. So that's not -- I don't think that was intended to be devious either, but it might have given rise to a different interpretation. This really has been a comedy of errors. The motion was filed one day out of time. It was filed on the 61st day. Therefore, the Court certainly did not within such 60-day period take any action. In fact, when there was no response to the motion which requested an extension to February 8, no order was presented to the Court. Under the local rules of this court if no order is presented within 20 days after the expiration of the appropriate notice period, the motion may be deemed -- I can't think of the word.
Mr. Underwood: withdrawn.
Mr. Kirk: Stricken.
The Court: -- Stricken-- I beg your pardon -- may be stricken by the Court or simply deemed to be of no force and effect. This Court has, frankly, not strictly adhered to that rule, has not strictly enforced it. It is being enforced more frequently now because the clerk's office has the appropriate manpower and wherewithal to track these matters, and the Court doesn't have to put a tickler out on every motion that's

filed. nevertheless less, no order was presented until February 8, that being the day that the extension was effective to. A subsequent motion was filed on February 5, three days earlier, to which Mr. Elliott takes exception, because at that time a trustee had been appointed, and the trustee was then the representative of the estate as opposed to the debtors, who had been debtors in possession prior to the appointment of a trustee. It is this Court's view that the language -- Well, let's go back again. In looking over this in preparation for this hearing, the Court probably should have wondered aloud at the time the order was presented to it -- and as everyone knows I don't read these motions when they're filed; I read them when they're set down for hearing, when there's a response. But 99 percent of the motions that are filed are not contested and an order is presented and they go away. But the Court probably would have wondered aloud as to why an extension had to be filed at all. The only reason for the extension would be to cover an unexpired lease of non-residential real estate. Anything else the debtor has until the confirmation of a plan within which to assume or reject under 365 (d) (2). So, I guess, the Court would have wondered, why are you filing something that says you want additional time to assume or reject an executory contract or an unexpired lease of residential real property or personal property when that isn't necessary? the motion was filed to protect this lease.

That's the only thing that was necessary to protect. Everything else the debtor had until confirmation to deal with one way or the other. Therefore, the style of the motion for additional time probably was more extensive than it was necessary, and the Court probably should have noticed it and inquired about it. Everybody says they can't find any law in the Tenth Circuit, and I'll grant you there is none that I know of on 364(d). And there's very little, as Mr. Hughey points out, on waiver and estoppel in this area. However, there is a Tenth Circuit decision August 31, 1990, in a different context, that I think, although not controlling, is certainly persuasive. And that's the case of *in re Brayshaw,* B-R-A-Y-S-H-A-W, 912 F2d 1255. In that case the Court was construing Rule 4003(b), which has to do with objections to exemptions, provides in material part the trustee may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors unless within such period further time is granted by the Court. Rule 9006(b) allows the enlargement of time periods, but specifically provides that the Court may enlarge the time for taking action under 40003(b) only to the extent stated in that rule. Now, in this case no order had been entered within the 30-day period, and, in fact, the motion was filed on the last day to extend the period. No order was entered. The Court in very short opinion says: "There simply is no room in the wording for

construing 4003(b) or 9006(b) to permit granting an extension of time to file objections outside the original 30-day time limit. We recognize that this may cause problems for many bankruptcy courts with crowded dockets or when the motion has been filed,: as here, "on the last day. But that is a matter for the drafters of the Bankruptcy Rules who appear to have thought precise time limitations were important in the situations presented here. We hold that the bankruptcy court was without power to grant the trustee's motion for an extension once the original period expired."

Although Rule 9006 isn't implicated in this case, and although, of course we're not dealing with 4003, we are dealing with vary similar language, the language being: "...If the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee with 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor."

All right. "Within such 60-day period." Rule 4003 has a 30-day period, and it says "unless within such period further time is granted by th court." That to me is very persuasive of what the Tenth Circuit would say if this issue was

presented to them. The lease has been deemed rejected at the end of the 60 days. There is the additional point --- and this is irrespective of the fact that a motion was filed by the debtors on February 5 -- that no action was taken by the Court prior to February 8, which is th only date to which any extension was granted. The court granted an extension to February 8, bu there was no further extension granted. The motion was filed, but no order was ever presented. That was going to take it, I believe, into March. So it seems to me that we really have two bases for the lease to be deemed rejected. And under 365 (a) (4) for the trustee to be under the obligation to immediately surrender the nonresidential real property to the lessor. Now, we get to the point of whether waiver or estoppel has any applicability. It is interesting to me that the parties favoring the waiver or estoppel argument rely heavily on the *Lew mark cleaners corporation* case out of the Eastern District of New York. Chief Judge Duerstein does, indeed, spend a considerable amount of time talking about waiver and estoppel and quoting form cases which take the position, probably an appropriate position, that there's a lot of problems that can arise by these deadlines being enforced. And it is interesting to me that then he concludes that the landlord's acceptance of rent after the Chapter 11 debtor's lease was deemed rejected by th passing of the 60-day period was not a waiver of automatic rejection. The conclusion in the case

basically rejected the waiver argument, or at least found that it wasn't present here. And that was on the basis of rental having been tendered and accepted after the 60-day period. The argument remaining, it seems to me, is that this court as a Court of equity really has the obligation to protect these debtors from their attorney's inaction, from perhaps their own action or inactions, because with this lease they can present to the Court what is believed to be a confirmable plan. This Court, I suppose, is a Court of equity, although the Supreme Court in recent opinions has made it pretty clear that does not mean the Court can do anything it wants to do just on the idea that this is equity. I believe that in the circumstances here presented -- and I take no pleasure in doing this; I recognize that in doing os, the result may be harmful to the debtors, it may be harmful to counsel for the debtors, it may be harmful to the other creditors of the debtors. I don't know that. But I believe, based on the actual language of the statute and on the Court of Appeal's language with regard to a very similar provision in a bankruptcy rule, that this court was without power to grant the request for an extension of time. The Court, therefore, must in my view vacate the order that it entered and direct the trustee to immediately turn over possession of the real property covered by the lease to the lessor. Is there anything further?

Mr. Kirk: May I address the Court, Your honor:

The Court: You may.
Mr. Kirk: The Court having made its ruling, it is the debtor's and trustee's position that the crops in ground remain part of the estate notwithstanding having to surrender the property. And we may need to address the issue of ownership of those crops.
The Court: The court can treat that as an oral motion, if you see fit.
Mr. Kirk: I hat to deal with something as significant as this issue -- the trustee is here an his counsel is here, but I wanted to bring this to the attention of the court.
The Court: Well, you don't have to bring it. It doesn't have to be decided today presumably. It can be the subject of a further motion. I don't think you would be foreclosed from raising this issue. Mr. Elliott, do you --
Mr. Elliott; no. You Honor.
The Court: You wouldn't defend on that ground, would you?
Mr. Elliott: No, Your Honor. Mr. Kirk and I may be able to work that issue out.
The Court: All right.
Mr. Kirk: The second issue, Your Honor, which is more prevalent -- I'm aware that this court intends to be absent from this jurisdiction for two weeks beginning sometime this next week-end.
The Court: I'll be leaving Sunday.
Mr. Kirk: The 10-day period within which to appeal the Court's ruling or to seek leave to file an appeal on an interlocutory basis will expire during the court's absence. And I suppose that if we were to timely file a motion that

the Court would consider it upon its return. But I was concerned about the passage of time with your pending absence.
The Court: If you file a motion, and we do not have language like we have in 365(b) and Rule 4003(b), then, the opposing parties have 18 days within which to respond. And the matter can -- I'll be back 18 days from now.
Mr. Kirk: Okay.
The Court: So, unless there's some reason to hurry this thing through, and if there is, I can be contacted any time in Tampa between cases in the evening, and I can deal with it, or I can speak with Judge Teselle or Judge Bohanon and ask them to deal with it for me. But I don't know why it would need to be dealt with within this two-week period.
Mr. Kirk: I guess the concerns I have, Your honor, is the impact that the loss of the leased ground has on the overall case itself.
The Court: Well, Mr. Kirk, I think I recognize what the impact is or what i've been told the impact is expected to be, but in that case, as you point out, I have made my ruling. If I'm wrong, somebody is going to have to tell me that. But I'm not going to change it.
Mr. Underwood: No, Your Honor, I think -
The Court: Mr. Underwood.
Mr. Underwood: - what I was trying to get Mr. Kirk to address is we have a confirmation hearing set for Friday, I believe. And we're going to have to propose an alternative plan due to this ruling.

The Court: Well, that confirmation hearing can be set off.
Mr. Underwood: Okay. Thank you, Your Honor.
The Court: Does anybody have any problem with that? We do have a problem, don't we Mr. Bickford?
Mr. Bickford: If I might, Your Honor --
The Court: Because you have a cash collateral order that expires.
Mr. Bickford: Let me try to explain the setting of the confirmation hearing, as I understand it. When the trustee was appointed by operation of law under 1121, the exclusivity period was deemed terminated. There was no longer an exclusivity period for the debtor to file a plan.
The Court: All right.
Mr. Bickford: By agreement on the entry of the order appointing a trustee, my client agreed not to file a competing plan until after March 1st. So it's not because of the statute, it's because of an agreement that we have put off the time for filing a competing plan.
The Court: I understand that, but that period -- you not --that agreement will not be modified if I put off the confirmation hearing. In other words, you client may very well file a plan.
Mr. Bickford: That's right. Unless there is a subsequent agreement to extend that time.
The Court: All right. Mr. Elliott, you client doesn't have any problem at this point whether or not the confirmation goes foe=rward.

Mr. Elliott: No, You Honor, it does not.
The Court: Mr. Hughey, I assume that the trustee with the exception of the fact that this agreement may bring us another plan, a competing plan, if you will, that there would be no objection in the circumstances to the continuance of the confirmation hearing on the debtor's plan.
Mr. Hughey: That's correct, Your Honor. We would like for Mr. Bickford to agree to extend the, to waive his --
The Court: I know you would like that, but I don't think he's willing -- he's certainly not in a position to do so having not known what was going to happen today.
Mr. Hughey: Yes. But I think it is absolutely necessary. I cannot imagine, can you, that we have a plan ready by Friday?
The Court: Well, I think even if you have a plan ready by Friday, your disclosure has got to be inadequate if this massive amount of acreage isn't in the plan.
Mr. Hughey: That's correct.
The Court: So, I think you're back to square one. And if Mr. Bickford's client wants to jump in and join the fray, he is open to do so. All right. Mr. Elliott, would you prepare an order, please?
Mr Elliott: Yes, Your Honor.
The Court: Within Five days. Yes sir.
Mr. Hughey: Your Honor, might we set an alternate date for a hearing on confirmation of the plan?

The court: Well, I don't think we can. I think we're going to have to go back to a hearing on approval of the disclosure statement. I mean, I don't see your proposing a plan that is not going to require a major modification to you disclosure statement.
Mr. Hughey: That's correct. That has to be correct.
The Court: So, let's see, the next scheduled disclosure statement and confirmation hearing is March 31. That would, seems to me, give plenty of time for you to give 25 days notice of it even after you have redrafted the disclosure statement, after the debtor has redrafted the disclosure statement.
Mr Hughey: That will give us something to shoot for.
The Court: So, let's set March 31 as the date for hearing on a modified or amended disclosure statement with the proviso that the notice of that hearing must be given to interested parties along with copies of the disclosure statement at least to the major creditors at least 25 days in advance of that date. Anything further? All right. We'll be in recess.
(End of Proceedings)

In the United States Bankruptcy Court
For the Western District of Oklahoma

In the matter of:
John C. and Wilma L. Dorman
debtors Case No. 92-16654 Ch 11

Transcript of Proceeding had on the 26 th day of February, 1993, held in the Sixth

Floor Courtroom of 201 Dean a. McGee Avenue, Oklahoma City, Ok

Before: The Honorable Paul B. Lindsey, United States Bankruptcy Judge for the Western District of Oklahoma.

Appearances:

For trustee	Mr. John Hughey Attorney at Law 300 Bank of Oklahoma Oklahoma City, Ok
For First Nat'l Bank Hooker, OK	Mr. Michael Bickford Attorney at Law Bank of Oklahoma Plaza Oklahoma City, OK

Mary Garvin, RPR
Court Reporter

PROCEEDINGS
(February 26, 1993)

The Court: 92-16654, John C. and Wilma L. Dorman.
Mr. Hughey: John Hughey for the trustee, Your Honor.
Mr. Bickford: Mike Bickford on behalf of First National Bank of Hooker.
The Court: Tell me about it, Mr. Bickford.
Mr. Bickford: Your Honor, this is a motion for emergency use of cash collateral by the trustee, and my client has an interest in the cash collateral. Notice has been sent by fax to all parties requesting notice. Mr. Kirk called me this morning and said that he

had a commitment in state court, but he had no objection to the relief requested in the motion. No other parties have -- I talked to Mr. Elliott, and he has no objection either. No other parties have made any overtures of whether they have a view one way or the other.
The Court: Mr. Elliott has not further interest in this I would think.
Mr. Bickford: That's right. He's easy to please now. The 14,000 or so which is proposed to be used by the trustee is necessary to meet some immediate operating meeds that are there on the farm that need to be attended to, cattle, and fuel, and other things that are necessities that re to be paid immediately. The motion requests and th parties have agreed, the trustee and the bank, that bank would receive a replacement lien on certain growing crops that would be based upon the debtor's projection of how much, how many acres of crop would yield this $14,000, and that replacement lien by agreement will be afforded a last source of collection of the bank's allowed claim, whatever it might be in th in case. So in other words as long as the collateral, which, as the Court knows by the motion, probably will be pending, the trustee, I believe, proposed a liquidating plan in this case, so long as the collateral which the Bank has satisfied its claim, then this replacement lien will not even be looked at to satisfy its claim, so we've place it in the last position.
The Court: These growing crops are not otherwise encumbered?

Mr. Bickford: That's correct.
The Court: And these growing crops are on land other than land owned by Mr. Elliott's client.
Mr. Bickford: That's also correct. This is owned land of the estate, Your Honor.
The Court: All right. Is that your proposal?
Mr. Hughey: It is, Your Honor.
The Court: Very well, it will be granted.
Mr. Hughey: Your Honor, one other thing we might mention, we've set the final hearing in this matter for the 23rd of March, if it please the Court.
The Court: All right. It's not likely that that's going to be anything other than an announcement either --
Mr. Hughey: That's correct.
Mr. Bickford: That's correct, Your Honor.
The Court: -- I would think since there's no objection.
Mr. Bickford: Thank you, Your Honor.
Mr. Hughey: Thank you, Your Honor.
The Court: Thank you, gentlemen.
(End of proceeding)